Writing Vulnerability into the Social Contract

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In western political traditions, the idea of political (and legal) subjectivity places the individual in relationship to the state and its institutions, with the understanding of the terms of the social contract defining the quality and nature of that relationship.[1] Specific conceptualizations of the political subject will affect the status of everyone in society, although not everyone may be considered a fully realized and legally capable subject. For example, at the formation of American democracy (and within its foundational documents), fully realized political subjectivity was limited to white, male, property-owning or tax-paying individuals of a certain age and religion, who were also "free."[2] Over the course of the nineteenth and twentieth centuries, certain of these qualifiers were removed and full political subjectivity was recognized for members of previously excluded groups. However, the expansion of the membership of the population granted full political subjectivity did not automatically transform the perceived nature or assumed capabilities of the political subject. Indeed, the inclusion of those previously excluded was based on the assertion that there were no relevant differences between them and the original political subject. The mode of inclusion was assimilation, underscored by the application of a principle of formal equality.[3]

The implications of this exclusion and eventual assimilation of women and significant numbers of previously excluded men are significant. While the contemporary race- and gender-neutral political subject may look different than the original, many aspects of the constitutional relationship between the political subject and the state remain similar to those developed hundreds of years ago. Importantly, the historic political subject was not only white, male, and propertied, but phenomenologically deemed to possess idealized qualities and characteristics derived from the aspirations, experiences, and perceived capabilities of the members of that limited and unrepresentative group. The experiences and perceptions of those previously excluded were, in many ways, significantly different from that narrowly

[1] That relationship also influences the way the law understands and defines the nature of the relationship among individuals and between individuals and societal institutions.

[2] Women, children and slaves, among others, had a lesser, diminished form of political subjectivity and were entitled to fewer rights, as well as different obligations.

[3] Formal equality eschews "special" treatment and affirmative action and therefore has difficulty accommodating claims of substantive equality because of the nature of the political subject as it is imagined; such demands cannot be accommodated consistent with that limited subjectivity. Over time, the role of the state has changed to be more or less supportive or charitable (contrast current welfare policy with the New Deal or Great Society), but the battles are always defined by and anchored in the image of the liberal political subject – a Lockean vision—where the social contract valorizes liberty and private property. Individuals who fail under this system have had to cast themselves as victims or blameless and unjustly injured or discriminated against in order to get some redress.

defined subject, and potentially incompatible with the norms and values underlying the original organization of state and individual responsibilities.[4]

The contemporary political subject incorporates only some of the host of possible variations in human characteristics, experiences, and capabilities: he is a fully functioning adult who is independent and self-sufficient, fully capable of taking care of his own needs and the needs of those dependent upon him. This political construct is theoretically inadequate, incapable of fully (or fairly) informing the development of political and legal norms to address many of the situations and circumstances that occur over the life course of most actual individuals. It is certainly inadequate to support a robust sense of social justice.

I. Equality Under Law

Let us consider the limitations of a right to equality as it is understood in the United States. Because such a right is inevitably balanced against liberty or autonomy, equality is a limited tool for addressing existing inequalities of wealth, power, and well-being. Constitutional jurisprudence requires that in order to be treated equally, individuals who are alike or the same must be treated alike or the same. This sameness-of-treatment version of equality positions unequal treatment, or discrimination, as the injury to be addressed. The mode of analysis is comparative – a person or group of persons asserts that they are inappropriately being treated differently from another person or group of persons that is legally indistinguishable from them.[5] Note that it is the difference in treatment that constitutes the harm. The state can ignore an issue or individuals, or it can treat them all badly, so long as it treats them the same.

When we are superficially focused on individuals and entities, and concerned only with their actions, motives, and injuries, an equality of treatment assessment implicitly requires that differences be marginalized or ignored. Differences only come into discussion when they are cast as a defense – a distinction that operates as a shield against different or discriminatory treatment. Otherwise an equivalence of position and possibilities are presumed and the individual is thus taken out of historic, social, economic, and political contexts. This narrowly focused approach to equality cannot effectively comprehend, let alone address, the growing inequality in wealth and political power that we have experienced in the United States over the past few decades.

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[4] Insofar as those qualities and characteristics were seen as intrinsic to the individual and not the products of institutional and social relationships that compensated, complemented and enhanced that individual, they were at best misleadingly simplistic. In particular, the emphasis on individual autonomy or liberty as a protection against state intervention assumed an inherent self-sufficiency that masked any actual individual's reliance on family, community, social and political structures and law in producing the ability to act or be independent. In fact, the political subject's position within these societal structures was not seen as undermining or compromising the ideas of autonomy and independence, but as manifestations of those characteristics as he assumed responsibility for family members, servants, residents and others who occupied statuses with lower political subjectivity.

[5] Drawing distinctions is inherent in the process of law making, so differences in treatment are inevitable. The courts have created review norms such as "strict scrutiny" that reflect the empirical reality that some distinctions are irrational, the product of animus, stereotyping, and bias. The general review standard is that the distinction must have a "rational basis" and be related to a "state interest."

In the United States, profound inequalities in circumstances, status, and well-being are tolerated—even justified—by reference to individual responsibility and warnings about the addictive dependency of welfare payments. The state's failure to respond to these inequalities is not considered an injury to either the individual citizen or the collective citizenry. Nor does the state have to provide any remedy that would involve establishing mechanisms to ensure the more equitable distribution of economic, political or social goods. Quite the opposite: under the dictates of equality the state is restrained from interference with an asserted meritocracy and the workings of a market constructed as "free." It is constitutionally restrained from intervening in order to readjust relationships or reorder responsibilities between and among individuals, groups, and institutions.

However there have been instances of constitutionally permitted state intervention over the course of American history, when the state has responded to social movements alleging specific harm or injury resulting from discrimination. In the mid-twentieth century, for example, there were assertions that discrimination based on certain personal characteristics were legally irrational and resulted in a distortion of the promise of equality of access and opportunity. This led to the development of a special, heightened scrutiny to be applied to distinctions or exclusions drawn along lines of race, gender and ethnicity. But rigorous attention and careful justification was not required of all distinctions; only discrimination as directed at a few selected groups. A person who cannot claim membership in one of those groups has thus been relatively unprotected from exclusion from things like employment, housing, or education that are generally available, but not entitlements. Absent some contract or other "right," the law allows unprotected individuals to be never hired or fired from employment on the whim of an employer, for any reason whatsoever or no reason at all. The law generally permits providers to deny housing or essential goods and services. So long as such dismissals and denials are not based on an impermissible classification, like race or gender, those so deprived will not have a valid discrimination claim.[6]

II. Inequality in Practice

It is not surprising that this approach to inequality has generated a politics of resentment and backlash on the part of those who feel outside of the protected groups. They have no recourse in law when they are excluded from jobs, housing, and other social necessities unless they manage to make a claim of "reverse discrimination."[7] Ironically, antidiscrimination law

[6] While individuals in protected classes might not win their suits, at least they have a claim and a chance to present their grievance.

[7] The increasing tendency of the courts to find reverse discrimination is related to the fact that the perceived original injury of impermissible discrimination has been "cured" by gender or race neutrality and formal equality. As that original injury recedes into history and demographics reveal some progress toward the inclusion of previously excluded groups, special scrutiny looks more like special, unjustifiable favored treatment. See opinion of Justice Sandra Day O'Connor in *Grutter v. Bollinger*, 539 U.S. 306 (2003) suggesting that while diverse college enrollments have proven educational benefits, colleges should not need race-conscious admissions policies 25 years in the future. See also Chief Justice Roberts in *Parents Involved in Community Schools v. Seattle School District No. 1*: 551 U.S. 701, 733–34 (2007) "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

increasingly doesn't always work to the benefit of protected groups either. Discrimination cases are the least successful cases at the trial level and, if they are won, are the most frequently overturned on appeal.

In addition, one group can be pitted against others in what is perceived to be a zero sum game that divides those who otherwise might be allies in a struggle for a more just society. Instead, cast as competitors, they struggle over the question of just whose oppression should really count in dividing up a limited pie. Legal and political battles over the past century have revolved around the question of whether a specific group seeking protection constituted a "discrete and insular minority." Demonstrating injury in the form of a lengthy history of exclusion, oppression, and discrimination allowed an analogy to be drawn that equated the injury claimed by a new group to that suffered by a historically protected class.

This process of arguing for redress through analogy is what unfolded when lesbians and gay men fought for marriage equality by arguing that their exclusion from the institution was discrimination based on animus. They drew an analogy to the prohibition of interracial marriage found in miscegenation statutes struck down in *Loving v. Virginia* as violating equal protection. Asserting the legal equivalence of the different identity categories of race and sexual orientation generated resentment and resistance on the part of some religious African American groups and others who did not weigh sexuality and marriage equality on the same scale as civil rights struggles over racial oppression. The marriage equality struggle reflects one of the most troubling legacies of our identity-based antidiscrimination approach to equality: it is narrowly exclusive. Too few groups are protected and those who are may not want to see that protection diluted by what they see as lesser injury claims under a civil rights mantle.

Perhaps the most significant problem with the way the equality discourse is organized around identity characteristics and the injury of discrimination, however, is that it ties us to historic exclusion and distorts our understanding of a variety of contemporary social problems. Identity categories have become proxies for social injustices (or injuries) such as poverty, over-incarceration, a sparse social welfare support system, and the failure of public education. The focus on only certain groups in regard to these injustices obscures the institutional, social, and cultural forces that distribute and perpetuate privilege and disadvantage in systems that transcend identity categories. This obfuscation is further enhanced by the fact that these problems now exist in a legal world that is gender and race neutral, allowing those who defend the status quo to assert that the problem lies with individuals, not institutions or structures.

In fact, nestled safely within the rhetoric of individual responsibility and autonomy, mechanisms such as equality assessments and identity-based antidiscrimination doctrine actually work to enshrine the notion that the American system and its institutions generally provide for true equality of access and opportunity. Discrimination is cast as the discoverable and correctable exception to an otherwise just and fair system in which legally equivalent individuals are at liberty to compete on equal terms on a level playing field.

What happens to those who fail in this system? They have been herded together by sociologists, political scientists, public health practitioners and others who study them as members of designated

"vulnerable populations" – populations warranting "special" treatment because they are not capable of acting responsibly. The political and legal response to the perceived vulnerability of these populations is typically surveillance and regulation. The response can be punitive and stigmatizing (as it is with prisoners, youth at risk, or, increasingly, single mothers needing welfare assistance) or it can be paternalistic and stigmatizing (as are the responses to the "deserving" poor, such as the elderly, children or individuals with disabilities). But note: what is common is the stigma attached to these groups. It is their perceived vulnerability that marks them as deviant and unworthy of full liberty. With their capacity compromised, their position outside of the autonomy provided in social contract is thereby justified.

This conception of vulnerability as belonging only to certain groups or "populations" of people is not only misleading and inaccurate; it is also perniciously over- and under-inclusive. In the first place, clustering individuals into what is conceptualized as a cohesive population based on one or two shared characteristics, whether those characteristics are based on identity (such as race or gender) or status, (such as poor or immigrant), masks significant differences among individuals. Secondly, asserting the group has significant differences from the general population obscures the similarities that members of the group will share with members of the larger society.

The most insidious effect of dividing individuals and pushing some into designated stigmatized vulnerable populations, however, is that such segmentation suggests that the rest of us are not vulnerable. Those who stand outside of the construct of "vulnerable populations" are thus constructed as invulnerable. This has implications for the way we construct state responsibility and understand individual capabilities. It can also determine whether and when we construe state action or inaction as injury. For these reasons, we need to advance the concept of the "vulnerable subject" to replace the liberal legal subject, advocating for a state responsive to universal and constant vulnerability, as well as recognizing the inevitability of human dependency over the life course.